Filed 6/6/19 P. v. Williams CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JAMAL WILLIAMS, Defendant and Appellant.	D075552 (Super. Ct. No. 16CR030951) ORDER MODIFYING OPINION AND DENYING REHEARING NO CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed herein on May 28, 2019, be modified as follows:

On page 8, new footnote 2 is inserted at the end of the second full paragraph (ending with "such an instruction was prejudicial."). All subsequent footnotes are renumbered.

The text of footnote 2 referenced above is as follows:

> [2] In a petition for rehearing, Williams contends we have applied the wrong standard of review to his claim of instructional error. We disagree. As stated, we review the entire record de novo to determine whether there is any evidence that would support a self-defense instruction. (See *Salas, supra*, 37 Cal.4th at p. 982.) The manner in which we have recited the factual background in the

previous section does not alter this standard. It introduces the reader to the issues involved, including the theories of both the prosecution and the defense. For purposes of *this* section, we have assessed the entire record, including the specific evidence and inferences that, in Williams's view, would support a self-defense instruction. His view is unreasonable, however, for the reasons we have discussed above. It posits a version of events that does not reflect the testimony of any witness—or any reasonable synthesis of their testimony. As such, the trial court properly declined to instruct the jury on self-defense.

There is no change in the judgment.

Appellant's petition for rehearing is denied.

O'ROURKE, Acting P. J.

Copies to: All parties

Filed 5/28/19 P. v. Williams CA4/1 (unmodified opinion)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JAMAL WILLIAMS, Defendant and Appellant.	D075552 (Super. Ct. No. 16CR030951)

APPEAL from a judgment of the Superior Court of San Bernardino County, Mary E. Fuller, Judge. (Retired Judge of the San Bernardino Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Steven S. Lubliner, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Alan L. Amann, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Jamal Williams of battery against a cohabitant (Pen. Code, § 243, subd. (e)(1)),[1] as a lesser included offense of corporal injury against a cohabitant (§ 273.5, subd. (a)). In connection with this offense, the jury found not true the allegation that Williams personally inflicted injury upon the victim that resulted in the termination of the victim's pregnancy. (§ 12022.9.) The jury also acquitted Williams of murder of a fetus (§ 187, subd. (a)) and assault by means likely to produce great bodily injury (§ 245, subd. (a)(4)). The trial court sentenced Williams to one year in jail.

Williams appeals. He argues that the trial court prejudicially erred by refusing to instruct the jury on self-defense and by sustaining several hearsay objections during his testimony. We disagree and affirm.

FACTS

For purposes of this section, we state the evidence in the light most favorable to the judgment. (See *People v. Osband* (1996) 13 Cal.4th 622, 690; *People v. Dawkins* (2014) 230 Cal.App.4th 991, 994.) Additional facts will be discussed where relevant in the following section.

Williams lived with the victim (his girlfriend), the victim's sister, the victim's mother, the mother's boyfriend, and various children. Williams had a history of domestic violence against the victim and was an admitted alcoholic.

By March 29, 2016, Williams and the victim had been in a romantic relationship for approximately 13 months. The victim was six months pregnant. On that date,

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1 Further statutory references are to the Penal Code unless otherwise specified.

Williams began drinking around 8:00 a.m. in the morning. The victim dropped her daughter off at school. When she returned, she confronted Williams about his drinking. After briefly arguing, Williams fell asleep. The victim went to a closet and began to pack Williams's things. The victim told her mother, who was upstairs, that she wanted to end her relationship with Williams.

The victim went downstairs, woke Williams up, and told him he needed to leave. Williams became angry and yelled at the victim. He threw her against two glass doors and began to choke her. The victim's mother came downstairs and told Williams he should leave. Williams refused. He told the victim and her mother that they would have to evict him.

During the argument, Williams shoved his way between the victim and her mother. The victim's mother became angry and lunged at Williams. Williams feigned a punch at the victim's mother, but he did not hit her. The victim confronted Williams and said several times, " 'Really? You're going to hit my mom?' "

Williams responded by attacking the victim. He threw her onto a bed, scratched her sides, and began punching her stomach. The victim's mother tried to pull Williams off, and at some point she put him into a headlock. The victim fell off the bed and onto the ground. Williams continued to hit and elbow the victim's stomach. He also choked her. The victim resisted and tried to push Williams away, but she eventually gave up. The victim's sister entered the room and worked with the victim's mother to try to pull Williams away from the victim. According to the victim and the victim's mother, during the attack Williams said, " 'I'm going to kill your baby.' "

The victim's mother told the victim's sister to get her boyfriend from upstairs. The boyfriend came down, grabbed Williams, and forced him into the garage. Williams left. The victim felt tired and nauseated, and she began to suffer painful cramps. The next day, the victim encountered problems with her pregnancy, went to the hospital, and delivered a stillborn baby boy.

At trial, Williams testified in his own defense. He acknowledged that his relationship with the victim had been "rocky." The victim or her mother had told Williams to leave multiple times. During arguments, sometimes Williams and the victim would grab back and forth. Williams denied hitting the victim, but he claimed she had scratched and bit him at least once before.

Williams testified that on the day of the attack he took the victim's daughter to school. He came home, drank a small amount of beer, and went to sleep. He said that the victim woke him up by shoving some papers in his mouth and telling him to get out. Williams did not want to leave. He wanted to stay and take care of the victim while she was pregnant.

Williams apparently changed his mind about leaving, however, and he went into their room and took a cell phone he had given the victim. The victim started grabbing at him. She called to her mother and sister to help her get the phone back. Williams tried to leave, but he was stopped by the three women. The victim's sister and mother were blocking the door. He tried to go between them and "nudged" the victim's mother. The victim and her mother got mad. The victim grabbed at him again, and the victim's mother put him in a headlock. She and Williams fell on the bed. He was holding onto

the cell phone in his pocket, but the three women were trying to get it from him. Williams said that the victim's sister produced a knife and tried to slice the phone from his pants pocket. Williams was not sure where the victim was at this point. Eventually, the victim's sister got the mother's boyfriend, he grabbed Williams, and they fell to the floor. Williams gave the victim her phone back, and he left the house.

Williams categorically denied hitting, punching, or elbowing the victim during the struggle. He said he was "extremely happy" the victim was pregnant and he wanted the baby.

DISCUSSION

I

Instruction on Self-Defense

Williams contends the trial court erred by not instructing the jury on self-defense. At trial, defense counsel briefly raised the issue of a potential self-defense instruction, but the court disagreed. The court stated, "He has presented no self-defense against [the victim]. He simply says he has no idea where she is. [¶] . . . [¶] His testimony, that he didn't know where [the victim] was, or what she was doing. So how can he complain that it was self-defense against—he's basically saying there was no assault on [the victim]; not that he was defending himself, but there was no assault" on the victim.

"It is well settled that a defendant has a right to have the trial court, on its own initiative, give a jury instruction on any affirmative defense for which the record contains substantial evidence [citation]—evidence sufficient for a reasonable jury to find in favor of the defendant [citation]—unless the defense is inconsistent with the defendant's theory

of the case [citation]. In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether 'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt.' " (*People v. Salas* (2006) 37 Cal.4th 967, 982 (*Salas*).) And, even requested instructions need not be given to the jury "absent substantial evidence to support them." (*People v. Stitely* (2005) 35 Cal.4th 514, 551 (*Stitely*); accord, *People v. Nguyen* (2015) 61 Cal.4th 1015, 1049.) "On review, we determine independently whether substantial evidence to support a defense existed." (*People v. Shelmire* (2005) 130 Cal.App.4th 1044, 1055; see *People v. Mentch* (2008) 45 Cal.4th 274, 288 ["On appeal, we likewise ask only whether the requested instruction was supported by substantial evidence—evidence that, if believed by a rational jury, would have raised a reasonable doubt . . . ."].)

Under the doctrine of self-defense, "[r]esistance sufficient to prevent the offense may be made by the party about to be injured . . . [t]o prevent an offense against his person, or his family, or some member thereof." (§ 693.) " 'To justify an act of self-defense . . . , the defendant must have an honest *and reasonable* belief that bodily injury is about to be inflicted on him. [Citation.]' [Citation.] The threat of bodily injury must be imminent [citation], and ' . . . any right of self-defense is limited to the use of such force as is reasonable under the circumstances.' " (*People v. Minifie* (1996) 13 Cal.4th 1055, 1064-1065.) In addition to bodily injury, courts have held that a defendant may use reasonable force to prevent any assault or battery. (See, e.g., *In re Marriage of G.* (2017)

11 Cal.App.5th 773, 780; *People v. Clark* (2011) 201 Cal.App.4th 235, 249; *People v. Myers* (1998) 61 Cal.App.4th 328, 335.)

The evidence here does not support a self-defense instruction. In his testimony, Williams denied attacking the victim. His testimony was flatly inconsistent with a finding of self-defense. Nor could the jury reasonably infer from the other evidence presented at trial that Williams acted in self-defense. The victim and her mother testified that, before the attack, Williams acted as if he would punch the victim's mother and the victim confronted Williams verbally. But this verbal confrontation does not provide an adequate basis for the jury to conclude that Williams acted with an honest and reasonable belief that the victim was about to commit an assault or battery against him. Williams, in his testimony, asserted that the victim "grabbed" at him. But even assuming that this testimony establishes that Williams had an honest and reasonable belief that the victim was about to commit a battery against him, the evidence does not support the conclusion that Williams punched or elbowed the victim in order to prevent or defend against such a battery. The victim and her relatives did not mention grabbing in their testimony, and Williams did not testify that he punched or elbowed the victim to prevent the grabbing. In fact, Williams testified he did not know where the victim was during the struggle. Moreover, even if Williams acted in response to either the victim's verbal confrontation or her grabbing at him, his actions were wholly unreasonable. Williams tackled the pregnant victim, held her down, and hit her repeatedly in the stomach while she and her family members struggled to stop the attack. No reasonable jury could conclude that Williams limited himself to force that was reasonable under the circumstances.

On this last point, Williams claims the evidence supports the conclusion that the only battery against the victim was elbowing her and that he was only elbowing the victim in an effort to get her sister and mother away from him. We disagree. This conclusion is not reasonable in light of the entire record. The evidence shows that Williams was elbowing the victim's sister and mother, if at all, because they were trying to prevent Williams's continued attack on the victim. The victim was hit by these elbows (under this scenario) because Williams was holding the victim down after he tackled her. Even this scenario, therefore, would require a finding that Williams attacked the victim—and not in self-defense. Based on the evidence presented, a reasonable jury could not believe that Williams attacked the victim while at the same time concluding that the only battery on the victim occurred accidentally as Williams elbowed the victim's mother and sister.

Because the evidence did not support a finding that Williams acted in self-defense, the trial court was not required to give an instruction on that theory, either sua sponte or on request. (See *Salas*, *supra*, 37 Cal.4th at p. 982; *Stitely*, *supra*, 35 Cal.4th at p. 551.) In light of our conclusion, we need not consider whether the failure to give such an instruction was prejudicial.

II

Hearsay Issues

Williams contends the trial court erred by sustaining several hearsay objections by the prosecution during his testimony at trial. Williams focuses on two instances. First, Williams's counsel asked him, "Did you ever tell [the victim], 'I'm taking this phone'?"

The prosecution objected on hearsay grounds, and the court sustained the objection. Second, Williams's counsel asked him, about the alleged struggle for the phone, "And what happens while they're all doing this?" Williams responded, "They weren't successful in getting my hands off my pockets. So, [the victim's mother] said to grab a knife and cut it out of my pocket." The prosecution objected and moved to strike this testimony as hearsay. The court agreed and granted the motion.[2]

" 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Williams argues that the court should not have sustained these objections because the out-of-court statements at issue were not offered for their truth, but for their effect on the listener.

As an initial matter, we consider whether Williams forfeited this argument by failing to articulate this nonhearsay purpose in the trial court. In general, a judgment may not be reversed for erroneous exclusion of evidence unless "[t]he substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means[.]" (Evid. Code, § 354, subd. (a).) A defendant's failure to articulate a theory of admissibility at trial forfeits reliance on that theory on

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2 Williams mentions several other instances where the trial court sustained hearsay objections during his testimony. But, as to these objections, it appears Williams is only seeking guidance for the trial court on remand, presuming that we order a retrial. Because we affirm the judgment, we need not consider these instances. And, in any event, Williams has not developed an argument for prejudicial error based on these additional instances. He has therefore established no grounds for reversal based on these instances.

appeal. (*People v. Pearson* (2013) 56 Cal.4th 393, 470, fn. 10 [defendant forfeited reliance on hearsay exception]; *People v. Luo* (2017) 16 Cal.App.5th 663, 678 [defendant forfeited reliance on nonhearsay purpose].) In response to the prosecution's objections here, Williams did not articulate the nonhearsay purpose (effect on the listener) that forms the basis for his claim of error on appeal. It is therefore forfeited.

Moreover, even if we were to consider the merits, and assume the court erred, we are confident that any error was not prejudicial under any standard of review. While Williams was prevented from testifying that he told the victim, "I'm taking this phone," he testified that he did take the phone and the victim knew it. He testified that the victim started grabbing him, and then she called her mother and sister "to get the phone back." The statement, "I'm taking this phone," adds nothing of substance to the jury's understanding of these events. Similarly, although Williams could not testify about the victim's mother's statement, that the victim's sister should "grab a knife and cut [the phone] out of my pocket," he testified that the sister actually produced a knife, sliced open his pants, and tried to cut out the phone. Again, the statement itself adds little to Williams's narrative. For these reasons, we disagree with Williams that, without these two statements, Williams's defense was "incoherent and illogical."

Based on our review of the record, admitting the two statements at issue would not have affected the jury's assessment of witness credibility or its verdict. Under these circumstances, the two assumed errors were harmless under both the "reasonable probability" standard (*People v. Watson* (1956) 46 Cal.2d 818, 837) and the federal

"beyond a reasonable doubt" standard (*Chapman v. California* (1967) 386 U.S. 18, 24). Williams's claim of cumulative error therefore fails for the same reasons.

DISPOSITION

The judgment is affirmed.

GUERRERO, J.

WE CONCUR:

O'ROURKE, Acting P. J.

DATO, J.